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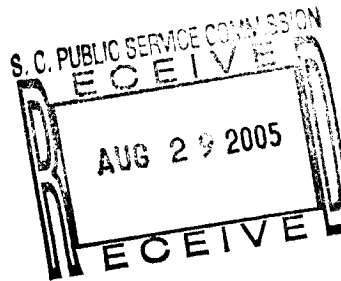
(803) 252-0724 | (803) 744-1556 *direct*

fellerbe@robinsonlaw.com

August 26, 2005

VIA HAND DELIVERY

Ms. Barbara Scott
Richland County Clerk of Court
Richland County Courthouse
1701 Main Street
Columbia, South Carolina 29201



Re: Time Warner Cable Information Services v PSC
Appeal of Order Nos. 2005-233 & 2005-367

Dear Ms. Scott:

On behalf of Time Warner Cable Information Services (South Carolina), LLC enclosed for filing please find the following:

1. Notice of Appeal of PSC Order Nos. 2005-233 & 2005-367,
2. Summons and Petition for Judicial Review,
3. Certificate of Exemption from Arbitration,
4. Cover Sheet for Civil Actions,
5. Certificate of Service, and
6. Check for \$150.00 in payment of your filing fees.

1995-216-C
2005-67-C

Please stamp the extra copies provided as proof of filing and return them with our courier. By copy of this letter we are serving the same on the Office of Regulatory Staff, counsel for MCImetroAccess Transmission Services, LLC, Farmers Telephone Cooperative, Inc.; Home Telephone Co., Inc.; PBT Telecom, Inc.; Hargray Telephone Co.; and the Public Service Commission of South Carolina. Please call if there are any questions.

Yours truly,
ROBINSON, MCFADDEN & MOORE, P.C.

Frank R. Ellerbe, III

FRE/bds
Enclosures
cc/enc:

Ms. Julie Patterson

Charles Terreni, Chief Clerk of PSC (certified mail, restricted, return receipt requested)

Dan F. Arnett, Chief of Staff of ORS (certified mail, restricted, return receipt requested)

Margaret M. Fox, Esquire (certified mail, restricted, return receipt requested)

John Bowen, Esquire (certified mail, restricted, return receipt requested)

Benjamin Mustian, Staff Attorney ORS (certified mail, restricted, return receipt requested)

Shannon Hudson, Staff Attorney ORS (certified mail, restricted, return receipt requested)

Dara W. Cothran, Esquire (certified mail, restricted, return receipt requested)

Kennard B. Woods, Esquire (certified mail, restricted, return receipt requested)

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Time Warner Cable Information Services
(South Carolina), LLC

Petitioner,

v.

Public Service Commission of South Carolina;
MCImetro Access Transmission Services, LLC;
Farmers Telephone Cooperative, Inc; Home
Telephone Co., Inc.; PBT Telecom, Inc.;
Hargray Telephone Co.; and Office of
Regulatory Staff,

Respondents.

)
) IN THE COURT OF COMMON PLEAS
)

) Case No.:
)
)

**NOTICE OF APPEAL
OF FINAL DECISION OF
ADMINISTRATIVE AGENCY**

TO: PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA; MCIMETRO ACCESS
TRANSMISSION SERVICES, LLC; FARMERS TELEPHONE COOPERATIVE,
INC.; HARGRAY TELEPHONE CO.; HOME TELEPHONE CO., INC.; PBT
TELECOM, INC.; AND OFFICE OF REGULATORY STAFF

YOU ARE HEREBY GIVEN NOTICE of the appeal of Time Warner Cable
Information Services (South Carolina), LLC of Orders Nos. 2005-233 and 2005-367 in
Docket No. 2005-67-C. Copies of the orders are attached as Exhibits 1 and 2.

Dated this 26th day of August, 2005

ROBINSON, MCFADDEN & MOORE, P.C.



Frank R. Ellerbe, III
Bonnie D. Shealy
Post Office Box 944
Columbia, SC 29202
Telephone: (803) 779-8900
Facsimile: (803) 252-0724

Attorneys for Time Warner Cable Information
Services (South Carolina), LLC

p. 1
3 9

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2005-67-C - ORDER NO. 2005-233
MAY 23, 2005

IN RE: Petition of MCImetro Access Transmission)	ORDER DENYING AND
Services, LLC for Arbitration with Farmers)	DISMISSING PETITION
Telephone Cooperative, Inc., Hargray)	TO INTERVENE
Telephone Company, Home Telephone Co.,)	
Inc. and PBT Telecom, Inc. under the)	
Telecommunications Act of 1996.)	

This matter comes before the Public Service Commission of South Carolina (the Commission) on a letter from Farmers Telephone Cooperative, Inc., Home Telephone Company, Inc., PBT Telecom, Inc., and Hargray Telephone Company (collectively, the RLECs) in opposition to a Petition to Intervene in this Docket filed by Time Warner Cable Information Services, LLC (TWCIS or Time Warner). The RLECs request that the Commission deny TWCIS' request to intervene in this docketed arbitration proceeding between MCImetro Access Transmission Services, LLC (MCI) and the individual RLECs. The Petition to Intervene is denied and dismissed, pursuant to the discussion and reasoning below.

The RLECs note that arbitration proceedings filed pursuant to Section 252 of the Telecommunications Act of 1996 (the Act) are not like the typical contested cases that the Commission presides over pursuant to the South Carolina Administrative Procedures Act (the APA). Instead, arbitration proceedings are a method used by two parties who have been unable to come to an agreement through negotiation. Arbitration proceedings are conducted by the Commission to assist the parties in resolving the differences they

have identified through the negotiation process in order to reach a final agreement between the parties. In other words, according to the RLECs, they are the culmination of the negotiation process contemplated under Sections 251 and 252 of the Act. Arbitration proceedings relate to a particular agreement and to the particular parties to that agreement. The RLECs state the belief that the fact that a third party may be interested in the issues or as TWCIS asserts, be interested in the final agreement itself, does not mean that those third parties should be permitted to participate in an arbitration proceeding. The negotiation process has taken place without Time Warner's involvement and, according to the RLECs, it would not be appropriate to interject TWCIS in the middle of the process now.

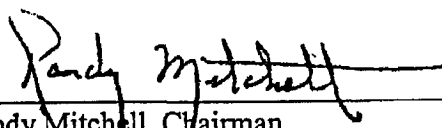
Further, the RLECs point out that the Commission has previously denied a Petition to Intervene filed by the Consumer Advocate in an arbitration proceeding. See Order No. 96-715 in Docket No. 96-262-C (BellSouth/ACSI Arbitration). Since the Consumer Advocate had a unique statutory role, the Commission did permit the Consumer Advocate to observe the proceedings, submit non-binding questions to the Arbitrator, and make opening and closing statements in the proceeding. However, the Commission specifically denied the Consumer Advocate's request to be granted intervenor status as a party of record. The RLECs point out that there is no unique statutory role to be filled by Time Warner in this case, but that Time Warner is merely a potential future customer of MCI in the service areas of the RLECs with whom MCI is seeking interconnection agreements. Therefore, under the RLECs' theory, Time Warner should not be permitted even to play a limited role in the resolution of this matter.

TWCIS, of course, takes a different view of the matter. Time Warner states that the South Carolina Administrative Procedures Act (APA) applies to this proceeding by definition, in that this case is a “contested case” under that Act. The APA states that a “contested case” is a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for a hearing.” S.C. Code Ann. Section 1-23-310(3). According to Time Warner, there is an existing contractual relationship between TWCIS and MCI which provides that MCI carry TWCIS’ traffic over the public switched telephone network. Also, Time Warner states that TWCIS’ legal rights will be directly affected by the decisions made during this proceeding, and that the decisions will directly impact TWCIS’ provisioning of services to its customers in the ILECs service area.

TWCIS states that it has a unique status in relation to this arbitration, in that it has an established agreement with MCI which will be directly affected by the decisions made in this proceeding. Lastly, Time Warner states that if it is not allowed to intervene, it will be substantially prejudiced by the administrative process. TWCIS states that one of the primary issues in dispute is whether MCI will be able to provide wholesale services to TWCIS. TWCIS notes that South Carolina recognizes that third party beneficiaries have rights in contracts created for their benefit, and that the disposition of this arbitration may as a practical matter impair or impede TWCIS’ ability to protect its interest in the current agreement with MCI. We understand the arguments proffered by TWCIS, but we agree with the position taken by the RLECs. The Petition to Intervene filed by TWCIS must be denied and dismissed.

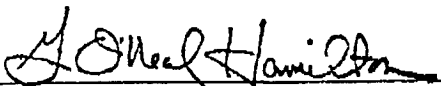
Clearly, TWCIS is not a party to the agreement to be arbitrated, and has therefore not been a participant in the negotiation process contemplated by Sections 251 and 252 of the Telecommunications Act of 1996. Arbitration proceedings, pursuant to the Telecommunications Act of 1996 are not like the typical contested cases that the Commission presides over pursuant to the APA. We agree with the RLECs that arbitration proceedings are a method used by two parties who have been unable to come to an agreement through negotiation. An arbitration proceeding is clearly the culmination of the negotiation process contemplated under Sections 251 and 252. Arbitration proceedings relate to a particular agreement and to the particular parties to that agreement. We disagree with TWCIS that its particular interest gives them the right to intervene as a party of record in this case. Accordingly, the Petition to Intervene is denied and dismissed. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:



Randy Mitchell, Chairman

ATTEST:



G. O'Neal Hamilton, Vice-Chairman

(SEAL)

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2005-67-C - ORDER NO. 2005-367
JULY 20, 2005

IN RE: Petition of MCImetro Access Transmission)	ORDER DENYING
Services, LLC for Arbitration of Certain)	PETITION FOR
Terms and Conditions of Proposed)	REHEARING OR
Agreement with Farmers Telephone)	RECONSIDERTION
Cooperative, Inc., Hargray Telephone)	
Company, Home Telephone Co., Inc. and)	
PBT Telecom, Inc. Concerning)	
Interconnection and Resale under the)	
Telecommunications Act of 1996.)	

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Petition for Rehearing or Reconsideration of Order No. 2005-233 filed by Time Warner Cable Information Services, LLC (TWCIS). Because TWCIS states no new matter in its Petition, and we believe that Order No. 2005-233 correctly stated the law under the circumstances, we deny and dismiss the Petition.

On May 23, 2005, this Commission issued Order No. 2005-233 in this docket, which denied a TWCIS request to intervene in the arbitration proceeding between MCImetro Access Transmission Services, LLC (MCI) and Farmers Telephone Cooperative, Inc. (Farmers), Home Telephone Co., Inc. (Home), PBT Telecom, Inc. (PBT) and Hargray Telephone Co. (Hargray)(collectively, the ILECs).

TWCIS states that when it applied for authority to offer services in South Carolina, it informed the Commission and the ILECs that in order to offer service the

company had to establish a connection over the public switched telephone network (PSTN). Further, TWCIS also notes that it informed the Commission and the ILECs that it planned to establish that connection through its contract with MCI. According to TWCIS, the decision reached in this arbitration will have a critical impact on TWCIS' ability to provide service to customers in the ILECs' service areas, and that not allowing TWCIS to participate as a party of record in a contested case while the Commission decides issues directly affecting its contractual rights violates the Administrative Procedures Act (APA).

Further, TWCIS states that the South Carolina Constitution requires an administrative agency to give procedural due process even when the matter is not a contested case as defined in the APA. TWCIS states that its situation is unique and calls for a different result from the Commission's past decisions in order to protect TWCIS' due process rights.

Lastly, TWCIS argues that its rights have been substantially prejudiced by this Commission's failure to allow TWCIS to participate in this arbitration proceeding. According to TWCIS, the primary disputed issue in this arbitration is whether MCI will be able to serve TWCIS customers through its agreement with the ILECs. TWCIS states that it has rights in the ILEC's interconnection agreement with MCI as a third party beneficiary of the contract, and that the Commission's denial of TWCIS' request to participate is arbitrary, capricious and characterized by an abuse of discretion.

Again, these allegations are not new. Second, Order No. 2005-233 correctly stated the law on this matter. However, this Commission feels compelled to expand our discussion of our reasoning.

Arbitrations of agreements between telecommunications carriers are clearly matters of Federal law. 47 U.S.C. Section 252 (b) (1) clearly calls for participation in the arbitration process by parties to the original negotiation. The section reads, in part, as follows: “During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues (emphasis added).” Accordingly, it is clear after reading this and the preceding and subsequent sections of the Telecommunications Act of 1996 that non-participants in the negotiation process under Sections 251 and 252 of the Telecommunications Act of 1996 may not be participants in arbitration proceedings with regard to agreements between telecommunications companies. An arbitration proceeding is clearly the culmination of the negotiation process contemplated under Sections 251 and 252. TWCIS did not participate in the negotiation process in this case, therefore, it may not participate in the arbitration. TWCIS points to no Federal statutory, regulatory, or case authority that would compel a different result.

Further, even if we took the position that State law is applicable, the South Carolina cases cited by TWCIS are unavailing and/or supportive of this Commission’s holding. TWCIS points to *Garris v. Governing Board of SC Reinsurance Facility*, 333 S.C. 432, 511 S.E. 2d 48, 52 (1999) for the proposition that by not allowing it to

participate as a party of record in a contested case while the Commission decides issues directly affecting its contractual rights, the Administrative Procedures Act is violated. No such language appears in the case cited. The case does stand for the principle that procedural due process must be afforded even in non-contested cases. See also *Stono River Environmental Protection Association, et. al v. South Carolina Department of Health and Environmental Control*, 305 S.C. 90, 406 S.E. 2d 340 (1991). However, again, the arbitration process under the Telecommunications Act of 1996 and its participants are matters of Federal statutory law.

Leventis v. South-Carolina Department of Health and Environmental Control, 340 S.C. 118, 530 S.E.2d 643 (Ct. App., 2000) holds that a party must show that it was substantially prejudiced by the administrative process to prove denial of due process in an administrative proceeding. According to TWCIS, the primary disputed issue in this arbitration is whether MCI will be able to serve TWCIS customers through its agreement with the ILECs, and that TWCIS has rights in the ILEC's interconnection agreement with MCI as a third party beneficiary of the contract. TWCIS then cites *Bob Hammond Construction Co., Inc. v. Banks Construction Co.*, 312 S.C. 422, 440 S.E. 2d 890, 891 (Ct. App., 1994) as support for its theory.

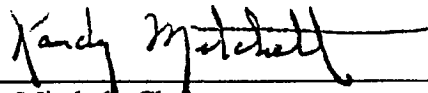
First, we disagree with TWCIS' characterization of the primary disputed issue in this arbitration. As shown by the record in this case, there were some seventeen issues presented in the "Disputed Language Matrix" in the case. Whereas some of the issues may certainly have been related to the service of TWCIS customers through MCI, it appears to this Commission that the issues also had general applicability to the service of

other customers through MCI as well. No evidence was presented during the hearing that the matters being arbitrated were primarily for the benefit of TWCIS. In addition, there were other disputed issues related to such matters as Calling Party Identification and Dispute Resolution/Continuation of Service that clearly had general applicability. Thus, we would characterize the TWCIS interest in this matter as incidental, rather than primary. Accordingly, we see no substantial prejudice as described under *Leventis*. Further, the *Bob Hammond Construction* case holds that if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create direct, rather than incidental or consequential benefits to the third person. 440 S.E. 2d at 891. The litigant in that case (a subcontractor) was found to have only incidental benefits from the contract of others. Again, in the present case, we see only incidental benefits to TWCIS under the present contract. Accordingly, we do not believe that TWCIS has the right to enforce the contract resulting from this arbitration, and we also therefore do not believe that TWCIS had the right to participate in the arbitration in this matter. Certainly, our original denial of TWCIS' right to participate was not arbitrary, capricious, or characterized by an abuse of discretion, but based on sound reasoning under Federal law. Even if State law is applicable in the present case, it supports this Commission's position to exclude TWCIS from the arbitration.

Based on the above-stated reasoning, we therefore deny and dismiss the Petition.

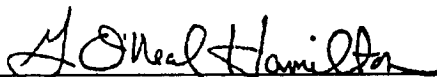
This Order shall remain in full force and effect until further Order of the
Commission.

BY ORDER OF THE COMMISSION:



Randy Mitchell, Chairman

ATTEST:



G. O'Neal Hamilton, Vice-Chairman

(SEAL)

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

Time Warner Cable Information
Services (South Carolina) , LLC,

Case No.:

Petitioner,

CERTIFICATE OF SERVICE

v.

Public Service Commission of South
Carolina, MCI metro Access
Transmission Services, LLC, et al.,

Respondents.

This is to certify that I, Toni C. Hawkins, a paralegal with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the person(s) named below the **Notice of Appeal and Summons and Petition for Judicial Review** in the foregoing matter by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

Charles Terreni, Chief Clerk
South Carolina Public Service Commission
P.O. Box 11649
Columbia, South Carolina 29211

Dan F. Arnett, Chief of Staff
Office of Regulatory Staff
Post Office Box 11263
Columbia, SC 29211

M. John Bowen, Jr., Esquire
McNair Law Firm, P.A.
P.O. Box 11390
Columbia, SC 29211

Margaret M. Fox, Esquire
McNair Law Firm, P.A.
P.O. Box 11390
Columbia, SC 29211

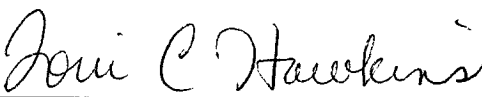
Shannon Hudson, Esquire
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Columbia, SC 29211

Benjamin P. Mustian, Esquire
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Darra W. Cothran, Esquire
Woodward, Cothran & Herndon
P.O. Box 12399
Columbia, SC 29211

Kennard B. Woods, Esquire
MCI, Law and Public Policy
Six Concourse Parkway, Suite 600
Atlanta, GA 30328

Dated at Columbia, South Carolina this 26th day of August, 2005.



Toni C. Hawkins

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Time Warner Cable Information
Services (South Carolina), LLC

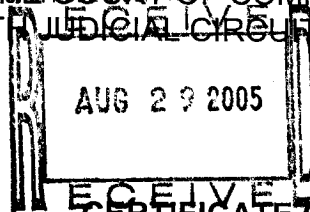
Petitioner,

v.

Public Service Commission of South
Carolina, MCImetro Access
Transmission Services, LLC, et al.

Respondents.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT



CERTIFICATE OF
EXEMPTION / WITHDRAWAL
FROM ARBITRATION / MEDIATION

I CERTIFY THAT THIS ACTION IS EXEMPT FROM ARBITRATION BECAUSE:

- ☐ monetary relief requested in this case exceeds \$25,000.00;
- ☐ this is a class action;
- ☐ there is a substantial claim for injunction or declaratory relief in this case;
- ☐ this case involves (check one or more of the following)
 - ☐ title to real estate;
 - ☐ wills, trusts and decedents' estates;
 - ☐ mortgage foreclosure;
 - ☐ partition;
- ☐ this is a special proceeding or action seeking extraordinary relief such as mandamus, habeas, corpus, or prohibition;
- ☐ monetary relief requested in this case is unspecified but exceeds \$25,000;
- ☐ this case is a companion or related to similar actions pending in other courts with which the action might be consolidated but for lack of jurisdiction or venue;
- ☒ this action is appellate in nature;
- ☐ this is a post-conviction relief matter;
- ☐ this is a forfeiture proceeding brought by the State; or
- ☐ this is a contempt of court proceeding.

Date: August 26, 2005

Attorney for Petitioner

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Time Warner Cable Information
Services (South Carolina), LLC

CIVIL ACTION COVERSHEET

Petitioner(s))

v.)

Public Service Commission, MCImetro
Access Transmission Services, LLC, et al.

Respondent(s))

(Please Print)

Submitted By: Frank R. Ellerbe, III

Address: Robinson, McFadden & Moore, P.C.

Post Office Box 944

Columbia, SC 29202

SC Bar #: 1866

Telephone #: (803) 779-8900

Fax #: (803) 252-0724

Other:

E-mail: fellerbe@robinsonlaw.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*-*If Action is Judgment/Settlement do not complete*

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR (certificate attached).

NATURE OF ACTION

(Check One Box Below)

- | | | | |
|--------------------------------------------------|-------------------------------------------------------|-----------------------------------------------------------|---------------------------------------------------------------------|
| Contracts | Torts - Professional Malpractice | Torts - Personal Injury | Real Property |
| <input type="checkbox"/> Construction (100) | <input type="checkbox"/> Dental Malpractice (200) | <input type="checkbox"/> Assault/Slander/Libel (300) | <input type="checkbox"/> Claim & Delivery (400) |
| <input type="checkbox"/> Debt Collection (110) | <input type="checkbox"/> Legal Malpractice (210) | <input type="checkbox"/> Conversion (310) | <input type="checkbox"/> Condemnation (410) |
| <input type="checkbox"/> Employment (120) | <input type="checkbox"/> Medical Malpractice (220) | <input type="checkbox"/> Motor Vehicle Accident (320) | <input type="checkbox"/> Foreclosure (420) |
| <input type="checkbox"/> General (130) | <input type="checkbox"/> Other (299) | <input type="checkbox"/> Premises Liability (330) | <input type="checkbox"/> Mechanic's Lien (430) |
| <input type="checkbox"/> Breach of Contract(140) | | <input type="checkbox"/> Products Liability (340) | <input type="checkbox"/> Partition (440) |
| <input type="checkbox"/> Other (199) | | <input type="checkbox"/> Personal Injury (350) | <input type="checkbox"/> Possession (450) |
| | | <input type="checkbox"/> Other (399) | <input type="checkbox"/> Building Code Violation (460) |
| | | | <input type="checkbox"/> Other (499) |
| Inmate Petitions | Judgments/Settlements | Administrative Law/Relief | Appeals |
| <input type="checkbox"/> PCR (500) | <input type="checkbox"/> Death Settlement (700) | <input type="checkbox"/> Reinstate Driver's License (800) | <input type="checkbox"/> Arbitration (900) |
| <input type="checkbox"/> Sexual Predator (510) | <input type="checkbox"/> Foreign Judgment (710) | <input type="checkbox"/> Judicial Review (810) | <input type="checkbox"/> Magistrate-Civil (910) |
| <input type="checkbox"/> Mandamus (520) | <input type="checkbox"/> Magistrate's Judgment (720) | <input type="checkbox"/> Relief (820) | <input type="checkbox"/> Magistrate-Criminal (920) |
| <input type="checkbox"/> Habeas Corpus (530) | <input type="checkbox"/> Minor Settlement (730) | <input type="checkbox"/> Permanent Injunction (830) | <input type="checkbox"/> Municipal (930) |
| <input type="checkbox"/> Other (599) | <input type="checkbox"/> Transcript Judgment (740) | <input type="checkbox"/> Forfeiture (840) | <input type="checkbox"/> Probate Court (940) |
| | <input type="checkbox"/> Lis Pendens (750)** | <input type="checkbox"/> Other (899) | <input type="checkbox"/> SCDOT (950) |
| | <input type="checkbox"/> Other (799) | | <input type="checkbox"/> Worker's Comp (960) |
| | | | <input type="checkbox"/> Zoning Board (970) |
| | | | <input type="checkbox"/> Administrative Law Judge (980) |
| Special/Complex/Other | <input type="checkbox"/> Pharmaceuticals (630) | | <input checked="" type="checkbox"/> Public Service Commission (990) |
| <input type="checkbox"/> Environmental (600) | <input type="checkbox"/> Unfair Trade Practices (640) | | <input type="checkbox"/> Employment Security Comm (991) |
| <input type="checkbox"/> Automobile Arb. (610) | <input type="checkbox"/> Other (699) | | <input type="checkbox"/> Other (999) |
| <input type="checkbox"/> Medical (620) | | | |

Submitting Party Signature: _____

Date: August 26, 2005

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

***FOR MANDATED ADR COUNTIES ONLY**

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral within 210 days of filing of this action, and the Plaintiff shall file a "Stipulation of Neutral Selection" on or before the 224th day after the filing of the action. If the parties cannot agree upon the selection of the neutral within 210 days, the Plaintiff shall notify the Court by filing a written "Request for the Appointment of a Neutral" on or before the 224th day after the filing of this action. The Court shall then appoint a neutral from the Court-approved mediator/arbitrator list.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Case are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Cases which are appellate in nature such as appeals or writs of certiorari;
 - c. Post Conviction relief matters;
 - d. Contempt of Court proceedings;
 - e. Forfeiture proceedings brought by the State;
 - f. Cases involving mortgage foreclosures; and
 - g. Cases that have been submitted to mediation with a certified mediator prior to the filing of this action.
4. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

* Florence, Horry, Lexington, Richland, Greenville, and Anderson

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Time Warner Cable Information Services
(South Carolina), LLC

Petitioner,

v.

Public Service Commission of South Carolina;
MCImetro Access Transmission Services, LLC;
Farmers Telephone Cooperative, Inc; Home
Telephone Co., Inc.; PBT Telecom, Inc.;
Hargray Telephone Co.; and Office of
Regulatory Staff,

Respondents.

)
) IN THE COURT OF COMMON PLEAS
)

) Case No.:

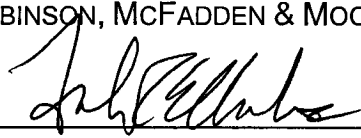
SUMMONS

) **(APPEAL OF A FINAL DECISION**
) **OF ADMINISTRATIVE AGENCY –**
) **ORDER NOS. 2005-233 & 2005-367)**

TO THE RESPONDENTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Petition for Judicial Review in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer on the subscribers at Post Office Box 944, Columbia, South Carolina 29202, within thirty (30) days of the date of service, exclusive of such day. In the event you fail to answer within the stated time, judgment by default will be rendered against you for the relief demanded in the Petition for Judicial Review.

ROBINSON, MCFADDEN & MOORE, P.C.



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August 26, 2005

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Time Warner Cable Information Services
(South Carolina), LLC

Petitioner,

v.

Public Service Commission of South Carolina;
MCImetro Access Transmission Services, LLC;
Farmers Telephone Cooperative, Inc.; Home
Telephone Co., Inc.; PBT Telecom, Inc.;
Hargray Telephone Co.; and Office of
Regulatory Staff,

Respondents.

)
) IN THE COURT OF COMMON PLEAS
)

) Case No.
)
)

) **PETITION FOR**
) **JUDICIAL REVIEW OF**
) **ORDER NOS. 2005-233 & 2005-367**
) **IN DOCKET NO. 2005-67-C**
) **OF THE PUBLIC SERVICE**
) **COMMISSION**
) **OF SOUTH CAROLINA**

Petitioner Time Warner Cable Information Services (South Carolina), LLC ("TWCIS") complaining of the Respondents Public Service Commission of South Carolina ("Commission"); Office of Regulatory Staff ("ORS"); MCImetro Access Transmission Services, LLC ("MCI"); Farmers Telephone Cooperative, Inc. ("Farmers"); Home Telephone Co., Inc. ("Home"); PBT Telecom, Inc. ("PBT"); and Hargray Telephone Co. ("Hargray") (collectively "Respondents") would respectfully show as follows:

1. This Court has jurisdiction to review the final orders of the Commission pursuant to S.C. Code Sections 1-23-380 and 58-9-1410. TWCIS seeks judicial review of Order Nos. 2005-233 and 2005-367 in which the Commission denied TWCIS' petition to intervene in an arbitration proceeding involving MCI, Farmers, Home, PBT, and Hargray.

2. TWCIS is a limited liability company organized under the laws of the State of Delaware. TWCIS was granted a certificate of public convenience and necessity to provide interexchange and local voice services in Docket No. 2003-362-C, Order No. 2004-213, on May 24, 2004, in areas of South Carolina where the incumbent local exchange telephone company currently did not have a rural exemption under 47 U.S.C. § 251(f)(1). TWCIS is currently certificated in Hargray's service area. TWCIS' also filed an application to amend its Certificate to serve customers in the service areas of Farmers, Home, and PBT. The Commission recently denied TWCIS' application to amend its certificate to serve Farmers, Home and PBT areas. TWCIS' petition for reconsideration of the order of denial is currently pending at the Commission.

3. The Respondents in this appeal are the Commission, ORS, MCI, Farmers, Hargray, Home, and PBT. MCI is a competitive local exchange carrier who has contracted with TWCIS to carry TWCIS' traffic over the public switched telephone network. Farmers, Hargray, Home and PBT (collectively "ILECs") are incumbent local exchange carriers.

4. The Commission is an administrative agency of the State of South Carolina which is authorized to supervise telephone utilities operating within the State of South Carolina and to arbitrate any open issues involving interconnection agreements pursuant to 47 U.S.C. Section 252(b).

5. ORS is an administrative agency of the State of South Carolina which is authorized to provide legal representation of the public interest before state courts in proceedings that could affect the rates or service of any public utility.

6. MCI filed a petition with the Commission to arbitrate certain terms and conditions of proposed interconnection agreements between MCI and Farmers, Hargray, Home and PBT. In the arbitration the ILECs are challenging MCI's ability to provide wholesale services to TWCIS. Since TWCIS uses MCI's facilities to complete its calls which flow over the public switched telephone network, TWCIS will be directly affected by the decisions made in the arbitration.

7. On April 15, 2005, TWCIS filed a petition to intervene in the MCI-ILEC Arbitration, Docket No. 2005-67-C. The petition to intervene was filed pursuant to 26 S.C. Regs. 103-836. The majority of the arbitration issues before the Commission directly relate to MCI's agreement to carry Voice over Internet Protocol ("VoIP") traffic for TWCIS.

8. The Commission issued Order No. 2005-233 on May 23, 2005, in which it denied and dismissed TWCIS's petition to intervene in the arbitration.

9. TWCIS filed its petition for rehearing or reconsideration of Order No. 2005-233 on June 20, 2005, pursuant to S.C. Code Section 58-9-1200 and 26 S.C. Regs. 103-836 requesting that the Commission reverse its decision and rehear the arbitration with TWCIS as a participant. The Commission issued Order No. 2005-367 in which it denied TWCIS' petition for reconsideration. TWCIS received Order No. 2005-367 on July 27, 2005.

10. TWCIS has exhausted all administrative remedies available to it and asserts that the Commission orders have prejudiced its substantial rights for the reasons set forth in this petition. The refusal of a petition to intervene is directly

appealable in that it affects the appellant's substantial rights. *Rutledge v. Tunno*, 63 S.C. 205, 41 S.E. 308, 309 (1902).

11. TWCIS asserts that the Orders are erroneous as a matter of law, issued in violation of constitutional or statutory provision, and are arbitrary and capricious or characterized by an abuse of discretion. TWCIS is entitled as a matter of legal right to judicial review and reversal of the Commission's decision for the following reasons.

THE ORDERS VIOLATE THE ADMINISTRATIVE PROCEDURES ACT

12. Order No. 2005-233 erroneously holds that TWCIS' interest does not give it the right to intervene. The South Carolina Administrative Procedures Act applies to this proceeding by definition. A "contested case" means a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for a hearing." S.C. Code § 1-23-310(3). MCI petitioned the Commission to arbitrate pursuant to Section 252(b) of the Telecommunications Act of 1996, 47 U.S.C.A. § 252(b). Section 252 requires the Commission to hear and rule on a petition for arbitration within nine months after the local exchange carrier received a request to arbitrate. The Courts have interpreted "contested case" as "one in which an agency is required by law to determine a party's rights after an opportunity for a hearing." *Garris v. Governing Board of the S.C. Reinsurance Facility*, 333 S.C. 432, 511 S.E.2d 48, 52 (Sup. Ct. 1999).

13. This proceeding is a "contested case" which will affect the legal rights of TWCIS, MCI, and the ILECs. TWCIS provides facilities-based Internet Protocol voice

services targeted to the residential market. In order to reach premises not served by TWCIS the call must go over the public switched telephone network. TWCIS currently completes these calls in South Carolina through its relationship with MCI. The ILECs are aware of this relationship as a result of their participation in both TWCIS certification proceedings. The MCI-ILEC arbitration addresses the very issue of whether it is appropriate for MCI to offer these services to TWCIS. As a result decisions reached in the arbitration will have a critical impact on TWCIS' ability to provide service to customers in the ILECs' service areas. The Order denied TWCIS to participate as a party of record while the Commission adjudicates issues which directly affect its contractual rights with MCI in violation of the Administrative Procedures Act. In Order No. 2005-367 the Commission refused to correct this error.

THE ORDERS VIOLATE TWICS DUE PROCESS RIGHTS

14. The Commission's order violates S.C. Constitution Article I, Section 22, which requires an administrative agency to give procedural due process to the parties that come before it even when the matter is not a "contested case" as defined by the Administrative Procedures Act. *Garris*, 511 S.E.2d at 52. S.C. Constitution Article I, Section 3, requires agencies to meet minimum standards of due process. Due process is flexible and calls for the procedural protection demanded by the particular situation. "In our view, constitutional due process provisions, apart from the APA, are sufficient to confer the rights to notice and for an opportunity to be heard." *Stono River Environmental Protection Association v. SC Dept. Health & Environmental Control*, 305

S.C. 90, 406 S.E.2d 340, 342 (Sup. Ct. 1991). The Commission failed to correct its violation of TWCIS' due process rights in Order No. 2005-367.

15. The Commission has substantially prejudiced TWCIS' rights by failing to allow TWCIS to participate in the arbitration proceeding. "To prove the denial of due process in an administrative proceeding, a party must show that it was substantially prejudiced by the administrative process." *Leventis v. S.C. Dept. of Health & Environmental Control*, 340 S.C. 118, 530 S.E.2d 643, 650 (Ct. App. 2000). TWCIS has an established agreement with MCI of which the ILECs are fully aware and TWCIS will be directly affected by the decision made in this proceeding. A cursory review of the arbitration issues demonstrate that the primary dispute in the arbitration revolves around MCI's provision of service to TWCIS to enable TWCIS to provide VoIP services. When a "contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than incidental or consequential, benefit to such person." *Hammond v Banks Construction*, 312 S.C. 422, 440 S.E.2d 890, 891 (Ct. App. 1994). Order No. 2005-367 erroneously concludes that TWCIS' interest in the matter is incidental rather than primary. As shown by the record in this case eight of the seventeen issues directly affected whether MCI can serve TWCIS. Issues 6, 10, 15, and 17 directly affect MCI's contract with TWICS and Issues 7, 9, 11, 12 address VoIP services. The evidence presented during the hearing by MCI Witness Darnell indicated that MCI had been able to resolve issues with rural carriers all over the country to provide service to TWCIS. The evidence directly addressed TWCIS relationship with MCI and indicated that MCI sought the contract for a third party, TWCIS who was a VoIP provider. The Order's denial of TWCIS' request to participate

was arbitrary, capricious and characterized by an abuse of discretion. Order No. 2005-367 failed to correct this error.

WHEREFORE, having fully set forth its grounds for judicial review, TWCIS respectfully requests that this Court review the Commission's orders and issue an order

- A. Reversing Order Nos. 2005-233 and 2005-367,
- B. Remanding the Matter to the Commission for rehearing with TWCIS as a party of record, and
- C. Granting such other relief as the Court may deem appropriate.

Dated this 26th day of August, 2005.

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